BEFORE THE BOARD OF PERSONNEL APPEALS

In the Matter of Unfair Labor Practice Charge No. 13-78:

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL #316, Complainant, vs. CITY OF LAUREL, Larry D. Herman, Mayor, Defendant.	ORDER

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On May 23, 1978, the employees of the City of Laurel, Montana Local #316, American Federation of State, County, and Municipal Employees, AFL-CIO, filed an unfair labor practice charge against the mayor and city council members acting in behalf of the City of Laurel. (See Addendum A for Complaint and June 1, 1978, Amendment.) The Complaint alleged that the City of Laurel, by refusing to allow accrual and compensation of fringe benefits during the strike of the Laurel city employees, violated Section 59-1605(1)(e), R.C.M. 1947 ("It is an unfair labor practice for a public employer to refuse to bargain collectively in good faith with an exclusive representative.") Specifically, the Complaint contended that, by the history of bargaining, intent of the agreement, and contract language, the City was bound to provide fringe benefits for the period of the strike by the following contract provision:

> The parties agree that no employee shall suffer any loss of fringe benefits or any other condition of employment because of membership in the union or activities on its behalf, however, employees shall not be paid for days spent on strike or for absence from work by reason of the strike. (1977-78 Contract, Article XXIII, No. 6.)

On June 7, 1978, the Board of Personnel Appeals received the Defendant's Motion and Answer to the charges. (See Addendum B.) Therein, the Defendant (1) denied the allegations that the language and the intent of the parties was to accumulate fringe benefits during the period of the strike, and (2) cited as an affirmative defense that any dispute as shown by the unfair labor practice

charge involved an interpretation of the present (1977-78) Contract between the Laurel City Employees Local #316 and the City of Laurel which calls for such dispute to go to a grievance procedure and arbitration. That contract, which defines a grievance as "any condition that exists which causes any City employee to feel that his/her rights have been violated," contains a grievance procedure which culminates in final and binding arbitration. (1977-78 Contract, Article XIX.)

The National Labor Relations Board administers the National Labor Relations Act, an act very similar to Montana's Collective Bargaining Act for Public Employees. Because of this similarity and the NLRB's considerable experience in labor relations, it is helpful to refer to NLRB precedent when considering a matter which has not yet been addressed by the Board of Personnel Appeals. The following discussion describes the NLRB's view of the relationship of an unfair labor practice charge to a contract's grievance/arbitration machinery.

In 1971, the National Labor Relations Board issued its landmark Collyer Insulated Wire decision which enunciated the NLRB's policy to refrain from exercising jurisdiction in respect to disputed conduct which is arguably both an unfair labor practice and a contract violation when the parties have voluntarily established by contract a binding settlement procedure. In that decision, the NLRB stated, in part, that:

> The courts have long recognized that an industrial relations dispute may involve conduct which, at least arguably, may contravene both the collective agreement and our statute. When the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, we are of the view that those procedures should be afforded full opportunity to function.[1]

Since 1971, the determination as to whether to defer alleged violations of Section 8(a)(5)[2] to arbitration has revolved around

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[1] Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971).

[2] "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

the factors which were relied upon by the NLRB majority to justify deferral in the Collyer case itself.

The dispute must arise within the confines of a stable collective bargaining relationship, without any assertion of enmity by the respondent toward the charging party. The NLRB applies its "usual deferral policies" if:

> ... there is effective dispute-solving machinery available, and if the combination of past and presently alleged misconduct does not appear to be of such character as to render the use of that machinery unpromising or futile...[3]

Using this criteria, the NLRB has declined to defer to arbitration when such circumstances as these have existed: (1) the unfair labor practice charge alleged that there was no stable collective bargaining relationship, (2) the respondent's conduct constituted a rejection of the principles of collective bargaining or the organizational rights of employees, (3) the unfair labor practice charge alleged that the employer's conduct was in retaliation or reprisal for an employee's resort to the grievance procedure or otherwise struck at the foundation of the grievance and arbitration mechanism, (4) the employer had interferred with the use of the grievance-arbitration procedure.[4]

The respondent must be willing to arbitrate the issue which is arbitrable. Criteria related to this factor are: (1) the respondent must be willing to arbitrate and/or willing to waive the procedural defense that the grievance is not timely filed, (2) the dispute must be clearly arbitrable or at least arguably covered by the contract and its arbitration provision, (3) a

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[3] United Aircraft Corp., 204 NLRB 879, 83 LRRM 1411 (1972).

[4] American Bar Association, The Developing Labor Law, Cumulative Supplement 1971-78 (Washington, D.C.: Bureau of National Affairs, Inc., 1976), p. 275-77.
1976 Supplement (Washington, D.C.: Bureau of National Affairs, Inc., 1977), p. 136-37.
1977 Supplement (Washington, D.C.: Bureau of National Affairs, Inc., 1978), p. 161-62.

final and binding procedure must exist.[5]

The dispute must center on the labor contract. The Collyer decision emphasized that the prearbitral deferral process was appropriate where the underlying dispute centered on the interpretation or application of the collective bargaining contract. This doctrine was clearly stated in the NLRB's 1972 Teamsters, Local 70 decision:

> In the Collyer case, we set forth the general considerations which led us to the conclusion that arbitration is the preferred procedure for resolving a dispute which could be submitted to arbitration concerning the meaning of the parties' agreement; we adhere to those views and we see no need to reiterate them here. Our concern, rather, is the application of the Collyer principles to the facts of this case.
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> ... the resolution of this dispute necessarily depends upon a determination of the correct interpretation of a contract; and as we said in Collyer, it is this precise type of dispute which can better be resolved by an arbitrator than by the Board.
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> ... It is thus our considered judgment that when, as here, the alleged unfair labor practices are so intimately entwined with matters of contractual interpretation, it would best effectuate the policies of the act to remit the parties in the first instance to the procedures which they have devised for determining the meaning of their agreement. (Emphasis added.)

In practical application, the factor requires that: (1) the contract contain language expressly governing the subject of the allegation, (2) the issue be deemed appropriate for resolution by an arbitrator, (3) the center of the dispute be interpretation of a contract clause rather than interpretation of a provision of the Act.

Even where there has been language in the contract upon which the dispute has been centered, the nature of the language has affected whether or not the NLRB has deferred an unfair labor practice complaint to arbitration. The NLRB has not deferred in cases where: (1) the contract language on its face was illegal

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[5] Ibid. 1971-75 Supplement, p. 277-79; 1976 Supplement, p. 137; 1977 Supplement, p. 162-163.

[6] Teamsters, Local 70 (National Biscuit Company), 198 NLRB 552, 80 LRRM 1727 (1972).

or may have compelled the arbitrator to reach a result inconsistent with the policy of the Act, (2) the respondent's argument construing the contract language to justify its conduct was "patently erroneous," (3) the contract language was unambiguous (and therefore the special competence of an arbitrator was not necessary to interpret the contract).[7]

The above-cited criteria indicate that the NLRB's Collyer doctrine would appropriately be applied to the unfair labor practice allegation now under consideration.

1. There is no evidence that this dispute does not arise within the confines of a stable collective bargaining relationship.

2. There is no evidence that the parties' past or present relationship would render the use of the grievance-arbitration process futile.

3. Because the respondent cited the availability and appropriateness of the contractually agreed upon grievance-arbitration procedure as an affirmative defense to this unfair labor practice charge, it is assumed that the respondent is willing to arbitrate this issue and to waive the procedural defense that the grievance is not timely filed.

4. The issue in dispute is covered by the collective bargaining agreement between the parties to this matter (1977-78 Contract, Article XXIII, No. 6). That collective bargaining agreement contains a grievance procedure which culminates in final and binding arbitration (1977-78 Contract, Article XIX). Therefore, the dispute is clearly arbitrable.

5. The dispute clearly centers on the interpretation or application of Article XXIII, No. 6 of the 1977-78 collective bargaining agreement.

6. The dispute is eminently suited to the arbitral process,

[7] Op. Cit, American Bar Association, 1971-78 Supplement, p. 279-282; 1976 Supplement, p. 137-138; 1977 Supplement, p. 163-164

and resolution of the contract issue by an arbitrator will probably dispose of the unfair labor practice issue.

This Board clearly has the authority to hear this complaint under the provisions of Section 59-1607, R.C.M. 1947. However, it is determined that the policies and provisions of the Act[8] would best be effectuated if this Board were to remand this complaint to the grievance-arbitration procedure specified by the collective bargaining agreement of the parties.

IT IS THEREFORE ORDERED that this Complaint be remanded to the grievance-arbitration procedure outlined in the collective bargaining agreement between the parties to this matter.

The respondent will, within ten days of receipt of this Order, file a written statement with this Board indicating that it is willing to arbitrate this issue and to waive the procedural defense that this grievance is not timely filed.

The parties will then process this grievance in accordance with the procedures outlined in Article XIX of the 1977-78 Contract.

This Board retains jurisdiction for the purpose of hearing this complaint as an unfair labor practice charge if:

1. the respondent does not, within ten days of receipt of this Order, file a written statement with this Board indicating that it is willing to arbitrate this issue and to waive the procedural defense that this grievance is not timely filed;

2. an appropriate and timely motion adequately demonstrates that this dispute has not, with reasonable promptness

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[8]Specifically, Section 59-1610, R.C.M. 1947, which states:

(2) An agreement may contain a grievance procedure culminating in final and binding arbitration of unresolved grievances and disputed interpretations of agreements.
(3) An agreement between the public employer and a labor organization shall be valid and enforced under its terms when entered into in accordance with the provisions of this act and signed....

after the issuance of this Order, been resolved in the grievance procedure or by arbitration; or

3. an appropriate and timely motion adequately demonstrates that the grievance or arbitration procedures were not conducted fairly.

DATED this 20th day of October, 1978.

BOARD OF PERSONNEL APPEALS

By Kathryn Walker
Kathryn Walker
Hearing Examiner

NOTICE

Exceptions may be filed to this Order within twenty days service thereof. Exceptions shall be addressed to the Board of Personnel Appeals, Box 202, Capitol Station, Helena, Montana 59601.

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CERTIFICATE OF MAILING

I, Elaine Schillinger, hereby certify and state that on the 20th day of October, 1978, a true and correct copy of the above captioned ORDER was sent to the following:

Mayor Larry D. Herman
City of Laurel
P.O. Box 6
Laurel, MT 59044

Mr. Donald R. Judge
AFSCME
600 North Cooke
Helena, MT 59601

Elaine Schillinger
Elaine Schillinger